IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1306

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

v.

EIGHTH REGIONAL WAR LABOR BOARD, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

REX G. BAKER,
NETH LEACHMAN,
J. Q. WEATHERLY,
JOHN H. CROOKER,
Counsel for Petitioner

ALPHA LAW BRIEF CO., HOUSTON

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To the Solicitor General of the United States, Washington, D. C., Francis M. Shea, Assistant Attorney General; Arnold Levy, Special Assistant to the Attorney General; Harry I. Rand, Attorney, Department of Justice; Clyde O. Eastus, United States Attorney; Frank B. Potter, Assistant United States Attorney, *Counsel for Respondents:*

You are hereby notified that a petition for writ of certiorari in the above entitled cause was filed in the Supreme Court of the United States on the_____day of May, 1945.

A printed copy of the record and a printed copy of the petition and brief are served upon you herewith.

REX G. BAKER,
NETH LEACHMAN,
J. Q. WEATHERLY,
JOHN H. CROOKER,
Counsel for Petitioner

Service accepted this_____ day of May, 1945:

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_____

_____

_____

Counsel for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No._____

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

v.

EIGHTH REGIONAL WAR LABOR BOARD, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Humble Oil & Refining Company, a Texas corporation, for a writ of certiorari to review the decree of

the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on March 1, 1945, which decree reverses an order of the District Court for the Northern District of Texas, dated September 21, 1944, granting a preliminary injunction, respectfully shows:

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (U.S.C.A., Title 28, Sec. 347(a)).

The date of the decree in the trial court was September 21, 1944 (R. 359). The opinion of the trial court appears in the Record at pages 361-375. Appeal was duly perfected and the decree of the Circuit Court of Appeals was entered March 1, 1945. The decree and opinion of the Circuit Court are included in the transcript of the proceedings in this case furnished and certified by the Clerk of the Fifth Circuit Court. This petition was duly filed in this Court within three months after March 1, 1945.

PRELIMINARY STATEMENT

The controlling issue in this case is: Whether a court of equity in Texas has power to restrain a wanton trespass upon and illegal seizure of property in Texas by a group of co-conspirators, part of whom live in Texas and are actively co-operating in the common design, and the other part of whom live outside Texas and are also actively co-operating in the same common design. The District Court answered the question in the affirmative and granted preliminary restraint—while the Circuit Court answered in the negative and dissolved the restraint. With this approach, we come to a

STATEMENT OF THE CASE

This is primarily *a conspiracy suit* filed by petitioner, Humble Oil & Refining Company in the Northern District of Texas. One group of defendants consisted of the Eighth Regional War Labor Board and its members, each and all of whom are residents of the Northern District of Texas. The other group of defendants consisted of the National War Labor Board and its members, Fred M. Vinson, Economic Stabilization Director, the Petroleum Administration for War, Harold L. Ickes, Administrator of the Petroleum Administration for War, Ralph K. Davies, Deputy Administrator of the Petroleum Administration for War, and George E. Dewey, agent and representative of the Petroleum Administration for War.

The Eighth Regional War Labor Board and its members will sometimes be referred to as the "Texas defendants." The remaining defendants are each and all residents of Washington, D. C., and will sometimes be referred to as the "Washington defendants."

This petition for certiorari seeks to have this Court review the action of the Circuit Court of Appeals for the Fifth Circuit in reversing an order of the District Court granting petitioner a preliminary injunction.

No fairer or more accurate statement of the case can be made than that of the trial judge by whom the case was heard. We, therefore, use excerpts from the District Court opinion as a proper and impartial statement. After stating that "sufficient jurisdictional facts are alleged," the District Court opinion continues with a statement of the case as follows:

> "The petition shows that the plaintiff has approximately thirteen thousand employees engaged in various phases of the oil business, such as production, trans-

portation, storage, refining, etc. That it has a refinery at Baytown, Texas, and one at Ingleside, Texas; in the latter of which it has four hundred and fifty employees, and is processing thirty-one thousand barrels of crude daily, and is furnishing a large part of its output for the war effort and under war contracts. That it has in its business nineteen different labor contracts and with no serious labor disputes at any point or place. That the relation between itself and its employees is happy and pleasant.

"That the labor bargaining agent with it at Ingleside was the C.I.O. * * * That the 1944 contract was signed, but that the C.I.O. retained the right to present its contention that there should be added to it a maintenance of membership clause * * * . This clause the plaintiff refused to put in the contract. It claimed that such a clause would bring about unhappy relations between it and its employees. Thereupon, the C.I.O. appealed to the Tri-Partite panel at Dallas, which panel approved the plaintiff's position. The matter was then presented to the Eighth Regional War Labor Board, which also approved and denied the right to demand the maintenance clause. That the C.I.O. then went to the National War Labor Board at Washington, presenting to it only such matters as had been presented to the Eighth Regional War Labor Board. Plaintiff notified the National War Labor Board that it assumed that it would be given a right to be heard. Such hearing was denied it, and on April 1st, 1944, the action of the panel and of the Eighth Regional War Labor Board was overruled and the insertion of the membership clause was ordered. This order was not made known to it until April 24th, 1944.

"Plaintiff alleges that there are a number of its employees at Ingleside who have belonged to the union, but are delinquent in the payment of their dues, and do not intend to pay dues, and that there are a number of employees who for other reasons desire to discontinue their Union membership, and the plaintiff fears that if a maintenance of Union membership clause is required to

be inserted in said contract it will be requested and required to discharge such employees, or that such employees will quit their work if such maintenance of membership enforcement is required. That replacements are not available, and such discharges would impair the efficiency and economic operation of the refinery and affect its production and other operations throughout the State of Texas, and thereby impair its war effort and efficiency."

After outlining the genesis of the scheme for a program of sanctions and penalties to be imposed upon employers who might not comply with a fiat of the National War Labor Board—*none of which was authorized or countenanced by any Act of Congress*—the opinion of the trial court continues its statement of the case:

"That in furtherance of such program against the plaintiff, the defendants, National War Labor Board and Regional Board, have refused to pass upon or process wage and salary rate applications made by the plaintiff. That such processing is equitably and reasonably required, in order to increase payments to certain of the plaintiff's employees, and that such refusal results in serious injury to the industrial relations between the company and its employees and interferes with the production of vital war material. 'That the National War Labor Board and the Eighth Regional War Labor Board have sought and are seeking by underhanded and secretive ways and means to coerce and compel plaintiff to comply with said order of April 1, 1944.'

" 'That the majority of the members of the National War Labor Board are acting together and in concert to compel and coerce the plaintiff to put into effect its illegal, wrongful, and injurious order and to impose upon plaintiff sanctions and penalties and other injustices shown * * * .' That it has actually begun the imposi-

tion of such penalties at its Baytown refinery and has threatened the same action and a seizure at Ingleside.

"That the defendant Vinson, Director, as aforesaid, through reports and notices, secured the co-operation of defendants Ickes, Davies, and Dewey, and induced them to join them and other defendants in the conspiracy as herein alleged against the plaintiff and, to also include in the object of the conspiracy, 'the unlawful taking over, by force, the plaintiff's entire plant, facilities and operations at Ingleside.' That it has no remedy for the securing of damages in the event such wrongful act or acts are permitted.

"It seeks a declaratory judgment with reference to the alleged illegality of the actions of the National War Labor Board, of the President's Order No. 9370, and of the President's letter to defendant Davis in connection with said order, as well as restraints, temporary and permanent.

"Notices were issued requiring the defendants to show cause at an early date why a temporary injunction should not issue, and temporary restraint was put into force, upon the giving of a $10,000.00 bond by the plaintiff until that date. Before that date the defendants asked for a postponement until Wednesday, September 20, and, it being agreeable to the plaintiff, an order was entered to that effect, and continuing the restraint.

"All parties being today present, the defendants presented two motions; one to dismiss for want of jurisdiction over non-resident defendants, and the other for a summary judgment. *There is and was no answer on the merits.**

"The parties agreed in open court to submit testimony by affidavits. The affidavits of the defendants are to the effect that they have no power to seize, or order a seizure of the plaintiff's property. That the sanctions which had been ordered, because of the plaintiff's failure

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* Italics throughout this petition and brief are ours unless otherwise stated.

to agree to a maintenance of membership clause in the contract, were without authority and had been withdrawn on the day after the suit was filed.

"The affidavits of the plaintiff support the allegations of its petition and show that the nonresident plaintiffs assisted and were concerned in the representations and threats made to the plaintiff as to the imminent seizure of its property." R. 361-369.)

After a full hearing and argument, the trial court found that the allegations in petitioner's bill in regard to threatened and actual imposition of illegal and unlawful sanctions and penalties upon the petitioner, and in regard to the threatened and impending forceful seizure of the petitioner's Ingleside Refinery—*all part of a conspiracy between all of the defendants to compel and coerce the petitioner into compliance with the Board's order*—were supported by ample evidence introduced at the show-cause hearing (R. 351-352).

The trial court further found that defendants, Eighth Regional War Labor Board and National War Labor Board,

> "*acted in concert* and illegally refused to consider or pass upon plaintiff's applications for wage adjustments containing requests for increases in wages for certain of its employees and have otherwise sought and may continue to apply sanctions against plaintiff because of its refusal to obey the National War Labor Board's directive order of April 1, 1944 (R. 351),

and that *all of the defendants,*

> "*acting in concert*, have conspired to enforce said directive order of the National War Labor Board, and for that purpose have applied sanctions against plaintiff and have expressed an intent to seize and have threatened to seize possession of and to take over and operate plaintiff's Ingleside Refinery near Corpus Christi, Texas,

> *there being in fact no interruption in the operation of said plant because of a strike or labor disturbance or for any other reason.* The plant is and has been operating to capacity in producing 91 octane aviation gasoline and other war products, and that there is no threat of such interruption for any cause whatsoever; that the National War Labor Board has not revoked or rescinded its directive order of April 1, 1944" (R. 352).

and that none of the defendants had given any assurance in open court or otherwise that they would not again apply additional sanctions or that they would not seize or interfere with petitioner's Ingleside plant because of its failure to obey the Board's order; and that the desire of defendants to enforce the Board's order *are the motives* prompting defendants to do the various acts about which petitioner complained in its bill (R. 352).

The trial court further found that it had jurisdiction over the subject matter of the action; that it had jurisdiction over a part of the defendants; and that

> "no harm could result to any of the defendants from being restrained and enjoined from taking action which they admit they have no lawful right to take, but great harm and irreparable injury and damage will be suffered by plaintiff, and in balancing the equities and convenience of the parties, the ends of justice will be served by not dismissing the action as to them at this time,"

and by entering the decree (R. 353).

The trial court further found that the evidence introduced by petitioner on the hearing amply showed that the *nonresident defendants assisted and were concerned* in the representations and threats made to petitioner as to the imminent seizure of its property (R. 369); and the trial court specifically found that

"unlawful and illegal sanctions were imposed. Such sanctions were being carried out. Threats were made to seize the plaintiff's property at Ingleside. *Those who claim a refuge in Washington, in certain marked instances, communicated with the agents, or, with the plaintiff in Texas, and with agents in this district. They, likewise, came into Texas.* They declined to talk of the merits of the order with reference to sanctions that had been imposed. They *demanded immediate compliance* by the insertion of a membership clause in the labor contract. They *announced that the seizure would take place* by the 8th of September. When the plaintiff *asked for a postponement* until September 11th, *that request was refused.* Those who made those threats *were in authority.* They *were in positions of power.* They were advisors of the President. They were recipients of previous instructions from the President. Those messengers and agents who came from Washington declared that they desired to *ascertain the disposition* of the plaintiff with reference to the continuation of the operation of the plant after its seizure" (R. 371).

The trial court denied, without prejudice, the defendants' motion for summary judgment, as well as their motion to dismiss the Texas defendants. On the motion to dismiss the Washington defendants, the court deferred its ruling "until a hearing on the merits or at some time prior thereto, under the rules (R. 353-354). The trial court granted the preliminary injunction prayed for in petitioner's bill (R. 354-358).

Defendants filed their application with the District Court for a stay of the preliminary injunction pending appeal therefrom, which was denied by the court (R. 359-361).

PROCEEDING AND OPINION IN CIRCUIT COURT OF APPEALS

In the Circuit Court of Appeals, defendants contended that the trial court abused its discretion in issuing the preliminary injunction; that petitioner's main complaint was with the Washington defendants who were not within the jurisdiction of the Texas Court; and that petitioner's complaint against the Texas defendants had become moot by reason of the National Board's having ordered the Regional Board (*after petitioner's bill was filed and the temporary restraining order granted*) to begin passing upon petitioner's Form 10 applications.

Petitioner answered defendants' contentions:

> (1) that its suit was against *all of the defendants as a group* who were illegally *acting together* to coerce petitioner into a contract which none of them had any *legal right* to compel petitioner to execute;
>
> (2) that petitioner's suit could not be viewed as *two separate complaints*—one against the Texas defendants for merely refusing to pass upon certain applications, and the other against the Washington defendants for threatening to take possession of petitioner's refinery—because petitioner's bill plainly alleged and the *undisputed facts* clearly showed that *all of the defendants* had formulated the program of coercion and that all of them were *acting together* pursuant to their *common design*—each part of the *group* doing all that its members could to *force* petitioner to do that which no one had any *legal right to* compel;
>
> (3) that the Texas defendants were properly before the court—each and all of them being residents of the Northern District of Texas and acting and performing some of their unlawful acts within the Northern District of Texas and each of them having been properly served within the territorial limits of the State of Texas;

(4) that the petitioner's bill set forth *and all the evidence showed* that the Texas defendants were actively doing everything they could in furtherance of the conspiracy—partly as *principal actors* and partly as *agents, officers and representatives* of the Washington defendants in aiding and assisting the latter in their threats to seize petitioner's plant; and

(5) that defendants *admitted* that they had already *performed illegal acts* against petitioner; that they had threatened to perform further illegal acts against petitioner; and they did not promise—or even suggest—that they would discontinue their program of coercing petitioner, but instead defendants asserted in open court that they *"might or might not seize petitioner's property."*

We must have failed to make these matters understood by the Circuit Court of Appeals, for its opinion states that:

"The gravamen of the complaint was that * * * the Texas defendants had improperly refused to process Form 10 applications filed by appellee, and the Washington defendants were threatening to take possession of appellee's refinery."

In our efforts to make our position plain to the Circuit Court of Appeals, we stressed the view that the Washington defendants were not indispensable parties and that in no event should the injunction be dissolved as against *all* of the defendants, since *each and all of them* were parties to the common scheme and program and were at once *principal and agent of each other;* that although the Washington defendants could not technically be subjected to the jurisdiction of the trial court as "parties", still they were subject to the binding force and effect of the injunction under Section 383 of Title 28, U. S. CODE, and Rule 65 (b) of the RULES OF CIVIL PROCEDURE because they were "in active concert and participation" with the Texas defendants in the conspiracy, and had

actual notice of the issuance of the injunction; and that since the trial court merely restrained the Washington defendants "to whatever extent * * * (it) may have jurisdiction over the persons of said defendants * * * *" (R. 356), the court intended thereby merely to "meet them at the borders of Texas" and restrain them from coming into Texas in concert with the local defendants in carrying out the illegal design which all of them were seeking to put into effect (R. 356).

That we failed to make these matters clear to the Circuit Court of Appeals is apparent from its comment upon them:

> "Without probing the soundness of this argument it is important to point out that it presupposes acts, or the threat of acts, on the part of the Texas defendants against which injunctive relief would be appropriate. The party defendant to the injunction proceeding must be a principal actor before an injunction may issue against him and others 'in active concert or participation' with him. The appellee here had no real controversy with the Texas defendants at the time the injunction was issued" (pp. 4 and 5, printed opinion, R.——).

In connection with the language just quoted, the opinion of the Circuit Court of Appeals contained a footnote referring to the case of OSBORN v. BANK OF UNITED STATES, 9 Wheat. 738. That case not only fails to support the Circuit Court of Appeals opinion here complained of—but *holds squarely to the contrary*.

The essential vice in the Circuit Court of Appeals opinion about which we complain arises from the fact that it adopts a *mere theory* of the case based entirely upon *contentions* in the brief and arguments of Counsel—rather than following the *stubborn facts* presented by the bill which were *undenied* and shown by *all the evidence*.

The trial court dealt with *undisputed facts and admissions* that shocked a court of equity into using its protective re-

straints to prevent wrong-doers from wanton encroachments upon the property rights of a patriotic, law-abiding citizen. The trial court acted only after defendants *admitted their utter lack of lawful* right to do the acts of which they were shown to be guilty and the more violent act (seizing the refinery) which they were actually threatening to do, and which in open court they stated *"might or might not" be done*—and the restraint imposed by the trial court was *merely preliminary*, pending a final hearing upon which even fuller facts could and would have been adduced. This brings us to the vital and important

QUESTION PRESENTED

Whether the District Court for the Northern District of Texas may issue a preliminary injunction to protect the property of a citizen of the State of Texas from unlawful seizure and irreparable injury by officials acting *without any semblance of lawful authority* and in furtherance of a conspiracy against the citizen, some of the conspirators being residents of and performing and threatening to further perform their unlawful acts in the Northern District of Texas, and some of the conspirators being nonresidents of the State of Texas and acting by, through and with the Texas conspirators.

REASONS FOR GRANTING THE WRIT

First Reason: The decision of the Circuit Court of Appeals holding that "the party defendant to the injunction proceeding must be a *principal actor* before an injunction may issue against him and others 'in active concert or participation' with him" is in conflict with the following decisions of the Supreme Court, the Circuit Court of Appeals for the Fifth Circuit, and other Circuit Courts of Appeals:

Supreme Court:

Osborn v. Bank of United States, 9 Wheat. 738;
Colorado v. Toll, 268 U.S. 228;
Philadelphia v. Stimson, 223 U.S. 605;
Goltra v. Weeks, 271 U.S. 536;
American School of Magnetic Healing v. McAnulty, 187 U.S. 94;

Circuit Court of Appeals for the Fifth Circuit:

Ryan v. Amazon Pet. Corp., 71 Fed. (2d) 1;
Yarnell v. Hillsborough Packing Co., 70 Fed. (2d) 435;

Other Circuit Courts of Appeals:

Eighth Circuit:
Noce v. Edward E. Morgan & Co., 106 Fed. (2d) 747;

Ninth Circuit:
Berdie v. Kurtz, 75 Fed. (2d) 898.

SECOND REASON: The decision of the Circuit Court of Appeals holding that a party defendant must be a *principal actor* before an injunction may issue against him and others "in active concert or participation" with him, is in conflict with Section 383, Title 28, U.S.C.A., and Rule 65 (d) of the RULES OF CIVIL PROCEDURE.

Each and all of the decisions and the statute and rule cited above support petitioner's position under Point I, which is:

Parties to a conspiracy who are within the jurisdiction of the court are subject to the injunctive restraints of a court of equity even though their principals and the chief source of the mischief are beyond the jurisdiction of the court.

THIRD REASON: The conflicts mentioned herein should be

eliminated and petitioner should be given the benefit of legal principles announced and customarily followed by this Court and Circuit Courts generally, as well as the benefit of the Statute and the Rule. Especially is the question presented of great public importance in protecting the rights of citizens against reckless encroachments by bureaus acting without semblance of legal right or authority.

FOURTH REASON. The decision of the Circuit Court of Appeals holding that petitioner "had no real controversy with the Texas defendants at the time the injunction was issued" is contrary to the following decision of the Supreme Court:

McCANDLESS v. FURLAUD, 296 U.S. 140.

The McCANDLESS case and many other cases support petitioner's assertion under Point II, which is:

The Circuit Court of Appeals erred in dissolving the preliminary injunction issued by the trial court against the Texas defendants since the undenied allegations in petitioner's bill and the uncontroverted evidence established that the Texas defendants were acting in concert with the Washington defendants in a conspiracy directed against petitioner.

FIFTH REASON: The decision of the Circuit Court of Appeals holding that the preliminary injunction order of the trial court was equivalent to a mandatory injunction to control official conduct is contrary to the following decisions of the Supreme Court, the Circuit Court of Appeals for the Fifth Circuit, and other Circuit Courts of Appeals:

Supreme Court:

Philadelphia v. Stimson, 223 U.S. 605;

Ex Parte Young, 209 U.S. 123;
Green v. Louisville & I. R. Co., 244 U.S. 499;

Circuit Court of Appeals for the Fifth Circuit:
Yarnell v. Hillsborough Packing Co., 70 Fed. (2d) 435;

Other Circuit Courts of Appeals:

Eighth Circuit:
Noce v. Edward E. Morgan Co., 106 Fed. (2d) 746;

Ninth Circuit:
Berdie v. Kurtz, 75 Fed. (2d) 898.

Each and all of the above decisions support petitioner's contention under Point III, which is:

The preliminary injunction order was not a mandatory injunction to control the official conduct of defendants, as was held by the Circuit Court of Appeals, and it merely restrained defendants from doing that which they admitted they had no authority to do, and which was inflicting irreparable injury on petitioner.

SIXTH REASON: The action of the Circuit Court of Appeals in considering the case *on its merits* and basing its opinion on facts that were not in existence at the time of the filing of petitioner's bill is contrary to the following decisions of the Supreme Court, the Circuit Court of Appeals for the Fifth Circuit, and other Circuit Courts of Appeals:

Supreme Court:

Alabama v. U. S., 279 U.S. 229;
Swift & Co. v. U. S., 276 U.S. 311;
Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 242 U.S. 202;

Rogers v. Hill, 289 U.S. 582;
International Brotherhood of Teamsters v. U. S., 291 U.S. 293;

Circuit Court of Appeals for the Fifth Circuit:

Fleming v. Jacksonville Paper Co., 128 Fed. (2d) 395;
Douglas v. Pan-American Bus Lines, 81 Fed. (2d) 222;

Other Circuit Courts of Appeals:

Seventh Circuit:
Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307.

Eighth Circuit:
Walling v. Reid, 139 Fed. (2d) 323.

Each and all of the above cases support petitioner's position under Point IV, which is:

The District Court properly determined Petitioner's right to a preliminary injunction on the basis of facts existing on the date its bill was filed and the Circuit Court of Appeals erred in dissolving the injunction on the basis of facts supposed to have arisen after the bill was filed and temporary restraint granted by the trial court.

Your Petitioner presents herewith a brief and citation of authorities.

Prayer

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court

of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered on its docket No. 11,157 and entitled "Eighth Regional War Labor Board, et al., Appellant, v. Humble Oil & Refining Company, Appellee;" and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and the judgment of the District Court sustained; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HUMBLE OIL & REFINING COMPANY,

By Rex G. Baker
President
Gen. Counsel & Director

REX G. BAKER,
NETH LEACHMAN,
J. Q. WEATHERLY,
JOHN H. CROOKER,
Counsel for Petitioner

THE STATE OF TEXAS)
(
COUNTY OF HARRIS)

REX G. BAKER, being first duly sworn, depo es and says that he is General Counsel and a Director of Humble Oil & Refining Company, Petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein are true as he verily believes.

Rex G. Baker

SWORN TO AND SUBSCRIBED before me this the 22 day of May, A. D. 1945.

Pearl T. Hagen

Notary Public in and for Harris County, Texas

We hereby certify that we have read the foregoing Petition and in our opinion it is well founded and entitled to the favorable consideration of this Honorable Court.

Rex G. Baker

J. Q. Weatherly

Neth Leachman

John H. Crooker

REX G. BAKER,
JOHN Q. WEATHERLY,
c/o Humble Oil & Refining Co.,
Houston, Texas;
NETH LEACHMAN,
Dallas, Texas;
JOHN H. CROOKER,
State National Bank Bldg.,
Houston, Texas,
Counsel for Petitioner

IN THE

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OCTOBER TERM, 1944

No._____

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

v.

EIGHTH REGIONAL WAR LABOR BOARD, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

(Related to First and Second Reasons why the writ Should be granted.)

Parties to a conspiracy who are within the jurisdiction of a court of equity are subject to the injunctive

restraints of the court where their principals and the chief source of their mischief are beyond the jurisdiction of the court.

In its opinion in this case, the Circuit Court of Appeals disposed of the whole suit by holding that the Texas defendants had to be *principal actors* before an injunction could issue against them and others in "active concert or participation" with them.

In connection with its holding, the Circuit Court cited no authority except a reference to the case of OSBORN v. BANK OF UNITED STATES, 9 WHEAT. 738, 6 L. Ed. 204. Not only does that case fail to support the Circuit Court's holding, but it holds *directly to the contrary*. The *sharp conflict* between the Circuit Court's holding in our case, and the holding of this Honorable Court in the OSBORN case can be readily seen when the language is contrasted. Here is the parallel:

The Supreme Court in OSBORN v. BANK OF UNITED STATES:

"* * * if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his

The Circuit Court in the case at bar:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

principal be joined in the suit." (6 L. Ed., local cit., p. 229.)

" * * * No plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party." (6 L. Ed., local cit. 229.)

Not only is the holding of the Circuit Court contrary to this Court's holding in the OSBORN case, but it is likewise contrary to the holdings of this Honorable Court in other leading cases. With the very question before it which is of controlling importance here, this Honorable Court has uniformly rejected the view announced by the Circuit Court in its decision of our case—this being apparent from the further contrast:

Outstanding cases by this Supreme Court:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi sovereign authority of the state. *There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant* (the Director of the National Park Service, a

re ident of Colorado) *without joining either his superior officers* (the Secretary of the Interior, a resident of Washington, D. C.) *or the United States.*" (Citing cases.) COLORADO v. TOLL, 268 U.S. 228, 69 Law. Ed. 927.

"If the conduct of the defendant constitutes an unwarrantable interfe r e n c e with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Citing cases.) *And in the case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments.* (Citing cases.) *And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.*" (Citing cases.) PHILADELPHIA v. STIMSON, 223 U.S. 605, 56 Law. Ed. 570.

The Circuit Court's holding in our case repeated:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

To the same effect is GOLTRA v. WEEKS, 271 U.S. 536, 70 L. Ed. 1074. We respectfully request the Court's close attention to the decision in that case, because it is by two of the great early judges of this Court and announces sound principles of law with which the holding of the Circuit Court of Appeals in the instant case is in sharp conflict.

In the case of AMERICAN SCHOOL OF MAGNETIC HEALING v. MCANNULTY, 187 U.S. 94, 47 Law. Ed. 90, suit was brought in the Circuit Court for the Western District of Missouri to enjoin a local Postmaster from carrying out an illegal unauthorized order of the Postmaster General. The Circuit Court sustained a demurrer to complainant's bill. Upon appeal, in reversing the order of the Circuit Court, this Honorable Court held:

> *"The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court.* In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. * * *.
>
> " * * * we are constrained to reverse the judgment of the circuit court, with instructions to overrule the defendant's demurrer to the amended bill, with leave to answer, *and to grant a temporary injunction* as *applied for by complainants*, * * * ." 47 Law Ed., local cit. 97.

That the holding of the Circuit Court of Appeals in this case is contrary to its own prior decisions is demonstrated conclusively by two well considered cases by the Fifth Circuit, in each of which that court passed upon the identical question which controls our case. Here are their earlier holdings, contrasted with that in the case at bar:

"The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined. *Although the actors may be authorized and incited by him so that he would be a proper codefendant if he were within the court's reach, the court has power to stop the trespassing by those within its jurisdiction irrespective of their claim that they were acting for others.* (Citing cases.) This is not a bill to cancel the Secretary's Regulations, but only to test their efficacy to protect defendants in their alleged trespasses against complainant's rights. There is no more need to make the Secretary a party for this purpose than to make the President a party because he promulgated the Code or the Congress because it enacted the statute." RYAN v. AMAZON PET. CORP., 71 Fed. (2d) 1, reversed on another point, 293 U.S. 338, 79 L. Ed. 446.

"We agree at once that the Secretary not being before the court, could not be enjoined from enforcing his regulations. (Citing cases.) But, *if those regulations are indeed invalid, the control*

Again the holding of the Fifth Circuit Court in disposing of our case is repeated:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

committee cannot shield themselves behind the Secretary, or compel compliance therewith in his name. Colorado v. Toll, 268 U.S. 228, 45 S. Ct. 505, 69 L. Ed. 927. *It follows that the Secretary was not an indispensable party.*" YARNELL v. HILLSBOROUGH PACKING CO., 70 Fed. (2d) 435.

The same *irreconcilable conflict* exists between well-considered opinions by other Circuit Courts of Appeals and the decision of our case by the Court of Appeals for the Fifth Circuit. The holdings in three such cases are used to further illustrate the sharp contrast:

"Where the act complained of is not authorized by statute, or where the statute authorizing it is void because in conflict with some provision of the Constitution, the person attempting it may be restrained in a proper case, notwithstanding his claim that he is acting in his official capacity. In such case he is acting, not within the law, but outside it, his act is not the act of the government, and the law affords him no protection for what he is doing or is about to do. *This is true, whether he be the head of a department or merely a subordinate acting under orders; and if a subordinate, there is*

At the risk of appearing monotonous, we reiterate the holding by which the Court of Civil Appeals for the Fifth Circuit disposed of this case:

"The party defendant to the injunction proceedings must be a principal actor before an injunction may issue against him and others in 'active concert or participation' with him."

no necessity of joining as defendant the head of the department because the orders of the head are immaterial if the act sought to be enjoined is not authorized by law. Colorado v. Toll, supra." FERRIS v. WILBUR, 27 Fed. (2d) 262.

"A suit to enjoin the defendant from doing that which the law authorized him to do would be, in effect, a suit against the United States. *A suit to enjoin him from doing a thing which was unlawful and unauthorized, would not be a suit against the United States, but a suit against the defendant as to individual, and it would be unnecessary to join any other party.*" NOCE v. MORGAN & Co., 106 Fed. (2d) 747.

"Appellants' next contention is that the Secretary of Agriculture is an indispensable party to this action. The appellees are not seeking to establish their title to anything other than their right to conduct their business under the constitutional guarantee of freedom of the right to contract. *The actions of the appellants who were seeking to carry out the regulations of the Secretary are not*

authorized by the act of Congress. The appellees are not engaged in 'interstate commerce,' and as to them the actions of the appellants constitute trespass. Under such circumstances the appellants cannot shield themselves behind the unauthorized regulations. The Secretary is not a necessary party." BERDIE v. KURTZ, 75 Fed. (2d) 898.

It is clear from these and a number of other decisions of this Honorable Court and of the various Circuit Courts of Appeals that parties to a conspiracy who are within the jurisdiction of the court are subject to the injunctive restraint of a court of equity, even though their principals, the chief source of the mischief, are beyond the jurisdiction of the court, and that is true even though the resident conspirators are acting under orders from the nonresident conspirators. The decision of the Circuit Court of Appeals in the instant case is contrary to well-established principle, and is, therefore, wholly untenable.

Furthermore, the holding of the Circuit Court of Appeals is contrary to the provisions of Section 383, Title 28, U.S. C.A., which provides:

> "Every order of injunction * * * shall be binding * * * upon parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participation with them, and who shall, by personal service or otherwise, have received actual notice of the same."

Rule 65 (d) of the RULES OF CIVIL PROCEDURE contains the identical provision.

Under the plain terms of the Statute and Rules, an injunction order is binding upon both principal and agent, master and servant, employer and employee, as well as all other persons "in active concert or participation" with the parties to the suit, provided only that such persons receive actual notice of the injunction order.

The Texas defendants were properly before the Court as parties. Each and all of them were properly served with process within the territorial limits of the State of Texas. Petitioner's bill alleged, the uncontroverted evidence showed, and the trial court found, that they were engaged "in concert" in the carrying out and furtherance of the entire conspiracy directed against petitioner. Undoubtedly, they were agents of and actively coöperating with the Washington defendants in the furtherance of the conspiracy (R. 371).

It is, therefore, apparent that the holding of the Circuit Court of Appeals that the preliminary injunction should be dissolved against the Texas defendants is contrary to the provisions of Section 383, Title 28, U. S. C. A., and Rule 65 (d) of the RULES OF CIVIL PROCEDURE, and leading authorities on the subject.

Public Importance

(Related to the Third Reason why the writ should be granted.)

In its efforts to protect its property from injury and seizure by governmental officers acting *without any semblance of legal right*, petitioner is clearly entitled to have the benefits of legal principles long established and followed by our courts. Petitioner has the undoubted right to have applied to this case the Statute (Section 283) and Rule 65(b) which the Circuit Court has disregarded in dissolving the preliminary injunction granted by the trial court.

But above and beyond petitioner's rights is the *great public importance* of the question involved in this case.

It is important to the Bench and Bar of America to eliminate the conflict between the Circuit Court's opinion in this case, and all the other authorities on this vital matter of courts of equity restraining wrongdoers acting in concert, pursuant to a common design.

Of equal—or perhaps far greater—public importance are the grave consequences which flow from persons in official positions *misusing and abusing* their places and vast powers to harass law-abiding citizens into submision to the fiat of the official—which in this case is *clearly contrary to law.*

The suggestion may be made that the activities of the defendants complained of was in anticipation of some kind of an order which the President might at some time in the future issue. The only Congressional authority on this subject is Section 9 of the SELECTIVE SERVICE AND TRAINING ACT, as amended by the WAR LABOR DISPUTES ACT (Title 50, Sec. 1503, U. S. C. A.). Under that Act the President is authorized to take over a war plant whenever he "finds, after investigation, and proclaims that there is *an interruption of the operation* of such plant, mine or facility as a result of a strike or other labor disturbance, * * * " and that such action is necessary in order to avoid impeding the war effort. The pleadings of petitioner alleged, the undisputed evidence showed, and the Court found that there had been *no actual or threatened interruption of operations* at the Ingleside Refinery. The statutes referred to confer no power upon any of the defendants to seize petitioner's refinery and the defendants in their brief in the Circuit Court denied that they were acting under instructions or orders from the President to seize the refinery.

Apparently recognizing the lack of any authority in the President, or the defendants as his agents and representatives, to impose sanctions and penalties or to take over the Ingleside

Refinery for the purpose of enforcing the order of the National War Labor Board, defendants may suggest that the President as Commander-in-Chief has power to seize private property under the Constitution, and that such power is separate and distinct from, and in addition to, that which has been expressly conferred upon him by Congress. That a state of war does not suspend the 5th Amendment to the Constitution, or authorize the President to confiscate property or deprive citizens of their property without due process and just compensation, is clear from the following authorities: Ex Parte Milligan, 18 L. Ed. 296; German Saboteur Cases, 87 L. Ed. 1; Fleming v. Page, 13 L. Ed. 276, 280; Japanese Curfew Cases, 87 L. Ed. 1774; 67 Corpus Juris 366; L. P. Stewart and Bro. v. O. P. A., 88 L. Ed. 1051.

The trial court expressly found that *all* of

> "the defendants, acting in concert, have conspired to enforce said directive order of the National War Labor Board, and for that purpose have applied sanctions against plaintiff, and have expressed an intent to seize and have threatened to seize possession of and take over and operate plaintiff's Ingleside Refinery * * * " (R. 352).

The Circuit Court of Appeals has not found contrary to that finding of the trial court—as indeed, it *could not do* in view of the *undenied facts and matters* set forth in petitioner's bill. Petitioner's bill made out a strong case of conspiracy among *all* of the defendants; the defendants *made no denial of or other answer* to the allegations contained in the bill; and the trial court heard evidence and expressly found that the proof introduced by petitioner amply supported its bill (R. 351-2).

Law-abiding citizens have the right to know that they and their property will be protected by the courts from unlawful

and unauthorized encroachments, trespasses and interferences by government officials, or otherwise. The legal principles long announced and followed by this Honorable Court and the various Circuit Courts of Appeals have assured citizens that they and their property are free from such unauthorized and unlawful encroachments, trespasses and interferences. The decision of the Circuit Court of Appeals in this case is contrary to those principles, and it is of the greatest public importance that this Court review the decision of the Circuit Court of Appeals with a view to conforming it with those great, equitable and democratic principles.

POINT II

(Related to the Fourth Reason why the writ should be granted.)

The Circuit Court of Appeals erred in dissolving the preliminary injunction issued by the trial court against the Texas defendants, since the undenied allegations in petitioner's bill and the uncontroverted evidence established that the Texas defendants were acting in concert with the Washington defendants in a conspiracy directed against petitioner.

The trial court had before it clear and pointed allegations of facts and matters in petitioner's bill, *which were undenied* by any defendant. After a full hearing, the trial court found from *uncontroverted evidence* that *all* of the defendants were engaged in the execution and furtherance of a conspiracy directed against petitioner, and that they were actually inflicting and threatening to inflict further irreparable injuries upon petitioner (R. 351-353).

Under well-established rules of law announced and uniformly followed by this Honorable Court and the various Circuit Courts of Appeals, each party to a conspiracy is liable

and responsible for *all* acts done in carrying out the conspiracy. McCANDLESS v. FURLAUD, 296 U.S. 140, 80 L. Ed. 121; SCOTT v. SANDERS, 290 Fed. 30.

In the McCANDLESS case, this Court held, at page 133 of 80 Lawyers' Edition:

> "The respondents make the point that Maxime Furlaud is not subject to personal liability for wrongs committed by the Furlaud Company or Kingston. He was the head and front of the conspiracy. *For anything done in fulfilment of the common purpose either by himself or by any of the corporations dominated by him, he and his confederates are liable in solido.* Mack v. Latta, 178 N.Y. 525, 532, 71 N.E. 97, 67 L.R.A. 126; Anderson v. Daley, 38 App. Div. 505, 56 N.Y.S. 511; 159 N.Y. 146, 53 N.E. 753; Irving Trust Co. v. Deutsch (C.C.A. 2d) 73 F. (2d) 121, 123; Jackson v. Smith, 254 U.S. 586, 589, 65 L.Ed. 418, 424, 41 S. Ct. 200."

In the SCOTT case, the Circuit Court of Appeals for the Sixth Circuit held:

> "The allegations of the petitioner are given at length in the statement of this case. It is sufficient, therefore, to call attention to the fact that it was averred in the petition that the administrator, John S. Wilson, the widow, Clara M. Saunders, R. W. Healey, and the Struthers Savings & Banking Company *entered into a fraudulent collusion and conspiracy* to defraud the estate of Robert M. Saunders, deceased, and to defraud the plaintiff, the mother of the defendant, of her distributive share of that estate, and that by reason of this fraudulent collusion and conspiracy the Struthers Savings & Banking Company came into possession of $25,000 belonging to the estate of Robert M. Saunders, substantially one-half of which the plaintiff was entitled to receive as her distributive share of her son's estate; * * * The District Court specifically found these allegations to be true, and the evidence fully sustains these findings. *It follows,*

therefore, that Helen M. Saunders, the mother of the deceased, could have maintained an action at law against either one of the wrongdoers who entered into this conspiracy and collusion, without joining any of the other parties thereto."

Many more decisions of this Court and the various Circuit Courts of Appeals hold that liability of parties engaged in the furtherance of a conspiracy is both joint and several, and that an injured party may proceed against all or any one or more of such parties. The principles are so well known that additional authorities are thought unnecessary.

The Texas defendants were operating as "one of the arms" of the Washington defendants in carrying out the conspiracy. At the time of the filing of petitioner's bill the Texas defendants had already committed acts within the Northern District of Texas under direct instructions from the Washington defendants, and it was shown they were threatening to commit further acts. All of the defendants admitted in open court that these acts were illegal and unauthorized. The trial court found, from the uncontroverted evidence that such acts were part of the over-all conspiracy among *all* of the defendants and that they were inflicting irreparable injury upon petitioner. *No defendant made any denial or other answer to the merits,* and the most significant statement from them was by their attorney in open court that petitioner's refinery *"might or might not" be seized.*

POINT III

(Related to the Fifth Reason why the writ should be granted.)

The preliminary injunction order was not a mandatory injunction to control the official conduct of defendants, as was held by the Circuit Court of Ap-

peals. It merely restrained defendants from doing that which they admitted they had no authority to do, and which was inflicting irreparable injury on petitioner.

The Circuit Court of Appeals held in this case that

> "An order directing the Regional Board and its members to refrain from failing to process Form 10 applications filed by appellee was equivalent to a mandatory injunction to control their official conduct."

That holding is clearly and grossly erroneous. The trial court merely restrained defendants from doing that which *they admitted they had no legal right or authority to do,* namely, to continue to harass petitioner in their efforts to coerce it into a contract which no one had any legal right to impose upon it. By no stretch of the imagination, could the court's order be construed to compel the Texas defendants to *approve* the applications. Not a word in the injunction indicates that any of the defendants were to take any *particular action* on any of the applications—and all the defendants were left entirely free to approve or *disapprove* any or all of the applications.

Defendants came into court and *admitted* that they had *no legal right or authority* to refuse to *pass upon* (process) petitioner's applications for wage adjustments for its employees because of petitioner's refusal to comply with the maintenance of membership order of the National Board. What petitioner was seeking, and what the trial court did in issuing the injunction order, was to prevent the defendants from doing that which they had *no lawful right or authority* to do, and which was a part of the acts which had been performed and were being performed in the furtherance of the conspiracy among *all* of the defendants.

This Court and the various Circuit Courts of Appeals have

long held that an injunction order to prevent Government officials from carrying out *unauthorized* acts does not amount to a control of their official conduct" or interfere with their official discretion. PHILADELPHIA CO. v. STIMSON, 223 U.S. 605, 56 L. Ed. 570; EX PARTE YOUNG, 209 U.S. 123, 52 L. Ed. 714; GREEN v. LOUISVILLE & I. R. CO., 244 U.S. 499, 61 L. Ed. 1280; YARNELL v. HILLSBOROUGH PACKING CO., 70 Fed. (2d) 435; NOCE v. EDWARD E. MORGAN CO., 106 F. (2d) 746; BERDIE v. KURTZ, 75 Fed. (2d) 898.

In the PHILADELPHIA CO. case, this court held, at page 577 of 56 LAWYER'S EDITION:

> "The complainant did not ask the court to *interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made.* The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In the EX PARTE YOUNG case this court held, at pages 728 and 729 of 52 LAWYER'S EDITION:

> "In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. Board of Liquidation v. McComb, 92 U.S. 531-541, 23 L. Ed. 623-628.
>
> "*The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of*

> *complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.*"

To the same effect is GREEN v. LOUISVILLE & I. R. Co., 244 U.S. 499, 61 L. Ed. 1280.

In the YARNELL case the Circuit Court of Appeals for the Fifth Circuit held:

> "Appellees attack the control committee's orders as being null and void, and so they had the right to apply to the court for relief in the first instance. Euclid v. Ambler Co., 272 U.S. 365, 386, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016."

To the same effect are: NOCE v. EDWARD E. MORGAN & Co. (C.C.A. Eighth), 106 Fed. (2d) 746, 749; BERDIE v. KURTZ (C.C.A. Ninth), 75 Fed. (2d) 898, 905.

The Circuit Court of Appeals in the instant case held contrary to the above decisions in holding that the injunction order was "equivalent to a mandatory injunction to control" defendants' "official conduct." No Government official has the discretion to perform arbitrary, capricious, unlawful or illegal acts that inflict irreparable injury upon a citizen or his property. When such an official acts outside the scope of his authority he ceases to act as a Government official and acts solely as an individual.

POINT IV

(Related to the Sixth Reason why the writ should be granted.)

The District Court properly determined petitioner's

right to a preliminary injunction on the basis of facts existing on the date its bill was filed and the Circuit Court of Appeals erred in dissolving the injunction on the basis of facts supposed to have arisen after the bill was filed and temporary restraint granted by the trial court.

The Circuit Court of Appeals placed great stress upon facts and conditions which were brought into existence by defendants *after* petitioner's bill was filed. One of such facts was the National War Labor Board's ordering the Regional Board to begin passing upon petitioner's Form 10 applications. The defendants admitted that their refusal to process such applications was unlawful and unauthorized. They did not deny that they had imposed sanctions and penalties upon petitioners—indeed, they *frankly admitted it,* and boldly asserted that they were without authority to impose such sanctions and penalties upon petitioner because of its refusal to comply with the National Board's order or for any other reason. The National Board did not order the Regional Board to begin processing the applications until *after* petitioner's bill was filed and temporary restraint was granted.

The action of the Circuit Court of Appeals in determining petitioner's right to the injunction on the basis of facts brought about by defendants after the suit was filed and temporary restraint granted, is contrary to the decisions of long standing of this Court and the various Circuit Courts of Appeals. On a hearing for temporary injunction, all the trial court should consider are the pleadings of the parties and the proof offered in support thereof. The court should not consider facts or conditions that occurred or came into existence after the date of filing the bill, *especially where such facts and conditions are brought about by the parties against whom the injunction is sought.*

None of the defendants filed any answer to the merits of petitioner's bill. Petitioner's bill made out a strong case showing a conspiracy among *all* of the defendants, and alleging acts already committed and about to be committed that were resulting and would further result in irreparable injury to petitioner. The proof offered by petitioner at the show-cause hearing amply supported petitioner's allegations in its bill, and this proof was uncontroverted by any of the defendants. On the basis of the facts as they were alleged in the bill and supported by the proof—and particularly in view of the position of defendants' attorneys in open court that the defendants "might or might not" seize petitioner's refinery—the trial court properly and providently determined that a preliminary injunction should issue. The action of the Circuit Court of Appeals in considering facts other than those that were in existence and set out in petitioner's bill, is erroneous and contrary to well established pronouncements of this Court and the Circuit Court of Appeals.

Alabama v. U. S., 279 U.S. 228, 73 L. Ed. 675;
Swift & Co. v. U. S., 276 U.S. 311, 72 L. Ed. 587;
Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co., 242 U.S. 202, 61 L. Ed. 202;
Rogers v. Hill, 289 U.S. 582, 77 L. Ed. 1385;
International Brotherhood of Teamsters v. U. S., 291 U.S. 293, 78 L. Ed. 804;
Fleming v. Jacksonville Paper Co., 128 Fed. (2d) 395;
Douglas v. Pan-American Bus Lines, 81 Fed. (2d) 222;
Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307;
Walling v. Reid, 139 Fed. (2d) 323.

In the ALABAMA case, this Court held at page 677 of the LAWYERS EDITION:

"The duty of this court, therefore, upon an appeal

from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

In the SWIFT & Co. case, the defendants, in asking that an injunction be dissolved, declared that at the time of the hearing in the trial court and before the decree was entered, the controversy had ceased and no illegal acts had been committed. In that connection this Court held at page 597 of 72 LAWYERS EDITION:

"The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated. * * * "

In the GOSHEN MFG. CO. case, the defendant alleged and proved that six months prior to the date of the filing of the bill it had sold its factory, wound up its business and had no intention of reassuming its activities. Throughout the intervening period, and also in answer to the bill, defendant attacked the validity of a certain patent and the right of the complainant to compel desistance. This Court held that such conduct was sufficient to support the issuance of an injunction since

" * * * the means (were) retained of further infringement * * * . We regard this conduct as a *continuing menace*, and we think complainant had a right to arrest its execution * * * . In other words, further infringement was in effect threatened and could be *reasonably apprehended*."

In the instant case, defendants did not promise to desist from imposing further sanctions and penalties on pe-

titioner and merely stated that the Ingleside Refinery "might or might not" be seized.

In the TEAMSTERS case there was involved a combination among wholesalers of poultry to increase the prices and monopolize trade in poultry alleged to be a conspiracy in violation of the Sherman Anti-Trust Act. An injunction was issued to prevent further violations of the Act. On appeal the contention was made that the injunction was improvidently issued because the conspiracy had been abandoned before the commencement of the suit. In that connection, this Court held at page 809 of LAWYERS EDITION:

> "Appellants' contention that the proof shows that they abandoned the conspiracy before the commencement of this suit cannot be sustained.
>
> "The conspiracy was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection and expenditure of enormous sums. In the absence of definite proof to that effect, ***abandonment will not be presumed***. Hyde v. United States, 225 U.S. 347, 369, 56 L. Ed. 1114, 1127, 32 S. Ct. 793, Ann. Cas. 1914A 614; Nyquist v. United States (C.C.A. 6th), 2 F. (2d) 504, 505. The Government introduced substantial evidence which uncontradicted and unexplained tends to show that the conspiracy and appellants' participation continued until the filing of the amended complaint. They were present in court but failed to testify in their own defense. It justly may be inferred that they were unable to show that they had abandoned the conspiracy and did not intend further to participate in it. Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges brought against them. * * * "

In the FLEMING case, the Circuit Court of Appeals for the Fifth Circuit held:

"Injunction is here, as it usually is, in the discretion of the court. *This case is not one where the violations were dead issues at the filing of the suit; nor was cessation entirely voluntary, but was the result of recent official pressure.* And Jacksonville Paper Company and the Administrator *were still at serious issue* as to some applications of the law. The District Court refused to hear the evidence as to violations between April 27, 1940, and the filing of the suit. We think it would have been in order to hear whether the violations were continuing and *whether if they had ceased there was no purpose to renew them; but it is clear there had been recent violations, and there was still contention, and this was enough to ground the grant of injunction upon.*"

In the DOUGLAS case, the Circuit Court of Appeals for the Fifth Circuit held:

"The injunction was granted August 26, 1935, on the sworn bill of complaint and nothing has been since done by appellants to bring the cause to trial on its merits. *No answer has been filed, no testimony taken. The only facts we have are those the bill alleges. An appeal under such circumstances ordinarily brings up nothing for review but whether discretion has been abused.* Butler v. D. A. Schulte, Inc. (C.C.A.), 67 F. (2d) 632, 635."

In the SEARS, ROEBUCK & CO. case it was insisted that the injunction was improvidently issued because certain methods complained of had been discontinued before the complaint was filed and hearing held, it being further asserted that there was no intention of reassuming such methods. The Circuit Court of Appeals for the Seventh Circuit, notwithstanding these facts, and passing its opinion on the GOSHEN MFG. CO. case, supra, sustained the right of the Commission to the injunction, and held:

> "No assurance is in sight that petitioner, *if it could not shake respondent's hand from its shoulder would not continue its former acts.*"

In the WALLING case, the Circuit Court of Appeals for the Eighth Circuit held:

> "We cannot agree that the mere ex parte statements of defendants charged with violations of law, admitting the violations charged but asserting in general terms that after the suit was instituted defendants ceased their illegal practices and will not again be guilty of them, are sufficient to justify a court in entering a summary judgment in favor of defendants, * * * Moreover, the cessation of violations of law, under official pressure or after suit is brought by a public agency to restrain their continuance, does not alone render moot the issues in the case, nor in every case require of the district court in the exercise of its sound discretion the denial of a restraining order."

It is clear from the decisions above referred to that where a complainant's bill sets forth acts warranting injunctive relief and is supported by ample proof, and the defendants fail to answer and deny the allegations in the bill, and fail to controvert the proof offered, the Circuit Court of Appeals on an appeal from the injunction order of the trial court is not authorized to consider acts done by the defendants to remedy the situation *after* the filing of the complainant's bill.

In the instant case there was no hearing on the merits. The hearing was merely upon the matter of preliminary injunction—it consisted solely of petitioner's verified bill, the motions to dismiss and for summary judgment filed by the defendants, and numerous affidavits introduced by petitioner

which the trial court found "amply supported" all of petitioner's substantial allegations.

The *motive* actuating defendants was their desire to force petitioner to obey the maintenance of membership order. They persisted in that desire. The motive for their unlawful and harmful conduct has not been removed. Surely it was improper for the Circuit Court to remove the restraining hand of the trial court until the case is tried on its merit .

It is unquestionably clear that under the authorities set forth above the District Court properly determined petitioner's right to a preliminary injunction on the basis of facts existing on the date petitioner's bill was filed, and that the Circuit Court of Appeals erred, and therefore held contrary to these decisions, in dissolving the injunction on the basis of facts supposed to have arisen after the bill was filed in the trial court.

Conclusion

It is respectfully submitted that this is a proper case for the issuance of a writ of certiorari, and petitioner so prays in this Court.

Respectfully submitted,

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1306

HUMBLE OIL & REFINING COMPANY, PETITIONER

v.

EIGHTH REGIONAL WAR LABOR BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Northern District of Texas (R. 361–375) is reported in 56 F. Supp. 950. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 380–384) is reported in 145 F. 2d 462.

JURISDICTION

The order of the District Court was entered on September 21, 1944 (R. 350–359). The judgment of the Circuit Court of Appeals was entered on December 21, 1944 (R. 384). The order of the

Circuit Court of Appeals denying petitioner's application for rehearing (R. 385–391) was entered on March 1, 1945 (R. 392). The petition for a writ of certiorari was filed on May 23, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the District Court of the United States for the Northern District of Texas had jurisdiction over the defendants who were not resident in Texas and who were not served with process there.

2. Whether these defendants were indispensable parties in whose absence the action could not be maintained.

3. Whether, in any event, a "directive order" of the National War Labor Board, issued subsequent to the War Labor Disputes Act and Executive Order 9370, may, in the circumstances of this case, be enjoined or declared invalid in this proceeding.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the statute and regulations involved, are set forth in the Appendix, pp. 15–17.

STATEMENT

On September 7, 1944, petitioner filed a complaint (R. 5–114) in the District Court of the

United States for the Northern District of Texas, seeking (1) to enjoin respondents from seizing or taking possession of petitioner's plant at Ingleside, Texas, and from enforcing or compelling compliance by petitioner with a "directive order" of the National War Labor Board issued on April 1, 1944, and (2) a declaratory judgment that such order was illegal and void and that respondents have no authority to enforce or compel compliance therewith (R. 59–61). The complaint named as defendants the Eighth Regional War Labor Board and, in their individual and official capacities, its members;[1] the National War Labor Board and, in their individual and official capacities, its members; the Director of Economic Stabilization; and the Petroleum Administration for War and, in their individual and official capacities, its Administrator, Deputy Administrator, and Manpower Counsellor (R. 3–9).

The material allegations of the complaint may be summarized as follows: Petitioner is engaged in producing and refining crude oil and its products (R. 9). It operates three refineries in the State of Texas, one of which is at Ingleside (R. 9–10). On May 14, 1943, petitioner entered into a collective bargaining agreement with the Oil

[1] For purposes of convenience and brevity these respondents, when referred to collectively *infra*, will be designated the "Texas respondents"; the other respondents, when referred to collectively, will be designated the "Washington respondents."

Workers' International Union, Local 316, which had been certified by the National Labor Relations Board as the exclusive bargaining representative of certain of petitioner's employees at its Ingleside plant (R. 10–11). The contract did not contain a "maintenance of membership" clause but the Union expressly reserved the right "to petition the War Labor Board for a directive covering" such a provision, without prejudice to the right of petitioner to resist the issuance or application of such a directive (R. 11–12). The Union thereafter referred the maintenance-of-membership question to the Conciliation Service of the United States Department of Labor, which referred it to the Secretary of Labor, who, in turn, referred it to the National War Labor Board (R. 13). A hearing was held on July 12, 1943, before a panel appointed by the Board to hear the dispute (R. 13). The panel recommended denial of the Union's request (R. 16, 176–183), and the Eighth Regional Board adopted the panel's recommendation (R. 16, 191–193). Upon the Union's petition for review, the National War Labor Board, on April 1, 1944, reversed the Regional Board's action and issued a directive order to the effect that the terms and conditions of employment at the Ingleside refinery be governed by a maintenance-of-membership provision (R. 16–17, 63–66). Petitioner has refused to comply with that directive order (R. 30).

The complaint charged that the National Board issued its order without affording petitioner a hearing (R. 17); that the order is illegal and void (R. 22); but that, nevertheless, action has been or is about to be taken towards its enforcement (R. 30–42). It was further alleged that the Eighth Regional Board refused, because of petitioner's noncompliance with the National Board's order, to consider or grant so-called Form 10 applications filed by petitioner for approval of voluntary wage increases for employees at refineries other than that at Ingleside (R. 31–36); that the National Board has reported petitioner's noncompliance to the Director of Economic Stabilization (R. 49); that he, in turn, has reported its noncompliance to the Petroleum Administration for War, its Administrator, Deputy Administrator, and Manpower Counsellor (R. 49); and that the said Deputy Administrator and Manpower Counsellor have threatened to take possession of the Ingleside plant unless petitioner complied with the National Board's order (R. 51–53). The complaint contained general allegations to the effect that a conspiracy exists among the respondents and other officers and agencies of the United States "whose names and identities are unknown" to coerce petitioner to comply with that order by the imposition of sanctions and penalties including the seizure of its Ingleside plant (R. 39–41, 49–54).

On the basis of the verified complaint, the district court, on September 7, 1944, issued an *ex parte* restraining order against the Petroleum Administration for War and its Administrator, Deputy Administrator, and Manpower Counsellor, and ordered all the respondents to show cause why a temporary injunction should not issue (R. 114–116).

The Washington respondents appeared specially and moved for dismissal as to them on the ground that the court lacked jurisdiction over them (R. 118–119) and, without waiving that motion, they and the Texas respondents moved to dismiss the complaint or, in the alternative, for summary judgment, on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (R. 119–121). In support of the motions and in opposition to the application for a preliminary injunction, respondents filed affidavits of respondents Wales T. Madden, chairman of the Eighth Regional Board (R. 144–147), Lloyd K. Garrison, a public member of the National Board (R. 122–125), Fred M. Vinson, Director of Economic Stabilization (R. 126–127), Ralph K. Davies, Deputy Administrator of the Petroleum Administration for War (R. 128–140), and George E. Dewey, Manpower Counsellor of that agency (R. 141–143). In support of its request for a preliminary injunction, petitioner filed 33 affidavits, all of which, except one, were ex-

ecuted by various of its directors, officers, or employees (R. 147–349).

From the affidavits it appeared that none of the Washington respondents is an inhabitant or resident of the State of Texas and none was served with process in that State (R. 122–123, 126, 128, 141); that neither the National nor the Regional Board has power to enforce the directive order of the National Board or to seize any of petitioner's property (R. 123, 145); that the Director of Economic Stabilization has no power to seize any of petitioner's property (R. 127); that the Regional Board does not have the power to refer the matter of petitioner's noncompliance either to the President, the Director of Economic Stabilization, or the Petroleum Administrator for War (R. 145); and that the matter of petitioner's noncompliance had not been reported to the President, the Director of Economic Stabilization, or the Petroleum Administrator for War (R. 123, 126–127, 145). Respondents' affidavits also stated that neither the National War Labor Board, the Director of Economic Stabilization, the Petroleum Administration for War, any of its officers or its employees, nor the Eighth Regional Board or its members, had at that time [2] either threatened to take or taken action to enforce the

[2] On June 5, 1945, the President issued Executive Order No. 9564, authorizing and directing the Petroleum Administrator to take possession of the petitioner's Ingleside plant and to operate it or arrange for its operation in such manner

National Board's order of April 1, 1944, or to seize any of petitioner's property (R. 123, 127–129, 144–145).

The affidavits further show that at the time the complaint herein was filed petitioner had pending before the Regional Board a number of Form 10 applications requesting approval of wage adjustments proposed to be made at plants other than that at Ingleside (R. 261–262, 267–271); that the Regional Board was refusing to process these applications because of petitioner's noncompliance with the National Board's order of April 1, 1944 (R. 256–257, 262–263, 265–266, 273–274); and that such refusal having been brought to the attention of the National Board, it immediately directed the Regional Board to consider and dispose of petitioner's Form 10 applications in accordance with established policies and without reference to petitioner's noncompliance (R. 124–125, 145–147, 246).

The district court denied respondents' motions for summary judgment (R. 353), overruled the

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as may be necessary for the successful prosecution of the war. In accordance with the Presidential Order, possession was taken by the Petroleum Administrator on June 6, 1945. On the same day, on the petitioner's application, an order was issued *ex parte* by the United States District Court for the Southern District of Texas, Corpus Christi Division, restraining Gordon T. Granger, the representative of the Petroleum Administration who had been designated to carry out the terms of the executive order, from seizing the plant, ejecting the petitioner therefrom, or interfering with its possession thereof.

Texas respondents' motions to dismiss (R. 353), deferred ruling on the Washington respondents' motions to dismiss (R. 354), and issued a preliminary injunction against the Texas respondents (R. 354–356) and against the Washington respondents "to whatever extent this court may have jurisdiction over the persons of said defendants" (R. 356), enjoining them and their attorneys, agents, representatives, and principals from seizing or interfering with petitioner's possession or control of its Ingleside plant for the purpose of enforcing or attempting to enforce the challenged order of the National Board and from taking any other action of any kind, by way of seizure, penalty, sanction, or otherwise, to compel petitioner to comply with the order (R. 355–358). On appeal to the Circuit Court of Appeals (R. 375–376), the order of the district court was reversed and the injunction dissolved (R. 384) on the grounds that the district court lacked jurisdiction to enjoin the Washington respondents and that no sufficient basis existed for the issuance of the injunction against the Texas respondents (R. 383–384).

ARGUMENT

The decision below is clearly correct, in each of its aspects, and further review is not warranted. Except for the fact that, as the court below held, the district court lacked jurisdiction over the Washington defendants and these defendants were indispensable parties in whose absence the action could not be maintained, the

petition for certiorari presents only questions which this Court has declined to review on three previous occasions during the present Term. *Employers Group, etc.* v. *National War Labor Board,* 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 735; *National War Labor Board* v. *Montgomery Ward & Co.,* 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *National War Labor Board* v. *United States Gypsum Co.,* 145 F. 2d 97 (App. D. C.), certiorari denied March 12, 1945, No. 857, this Term. In each of these cases the National War Labor Board and its members and the Director of Economic Stabilization were properly before the United States District Court for the District of Columbia and were subject to its jurisdiction; the petitioners in those cases were not embarrassed, as is the petitioner here, by the additional difficulties arising from the fact that this suit was brought in a district in which none of the Washington defendants resides, either officially or personally, and that no personal service was obtained there.

1. Since none of the Washington respondents was individually or officially an inhabitant or resident of the State of Texas and none was served with process there (R. 122–123, 126, 128, 141), the district court was without jurisdiction over them and, accordingly, did not have the power to issue any *in personam* order or decree, interlocutory or final, against any of them. Rule 4 (f), F. R. C. P.; *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *Munter* v. *Weil Co.,* 261 U. S. 276; *Putnam*

v. *Ickes*, 78 F. 2d 223 (App. D. C.), certiorari denied, 296 U. S. 612; *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229. This rule has found frequent application in suits against Federal agencies and officers. *Butterworth* v. *Hill*, 114 U. S. 128; *Hill* v. *Wallace*, 259 U. S. 44, 72; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 99 (C. C. A. 5), certiorari denied, 299 U. S. 559; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.[3] The allegations of conspiracy in the complaint could not enlarge the jurisdiction of the district court. *Hitchman Coal and Coke Co.* v. *Mitchell, supra.*[4]

2. The district court, having failed to obtain jurisdiction over the Washington respondents,

[3] Even if the Washington respondents could be and had been personally served with process in the State of Texas, this action could not, for want of venue, be maintained against them. Their official residence is the District of Columbia, and that residence controls for purposes of venue in suits, such as this one, brought against them for acts growing out of performance of their official duties. *Butterworth* v. *Hill, supra; Bradley Lumber Co.* v. *National Labor Relations Board, supra; Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.).

[4] The cases cited by petitioner (Pet. 16, 23–31) to the contrary are not in point. Two of those cases, where injunctions were sought against the Secretary of War, were concerned with the question of whether the suits were against the United States. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Goltra* v. *Weeks*, 271 U. S. 536. The other cases mainly involved suits against subordinate officials where they, as distinguished from the Texas respondents here, were the principal or primary actors themselves, in the sense that they were either doing the very acts complained of or had the actual power to do them.

should properly have dismissed the action. The gist of the petitioner's complaint is that the Washington respondents were taking or had threatened to take steps to enforce the order of the National Board. In effect, petitioner sought to have declared invalid that order and Executive Order No. 9370 and to have the enforcement of the former and the application of the latter enjoined. In such an action the Washington respondents were indispensable parties without whom the case could not proceed. It seems clear that the National Board, its members, and the Director of Economic Stabilization have an interest in this suit "of such a nature that a final decree cannot be made without * * * affecting that interest * * *." *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 236; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Guerich* v. *Rutter*, 265 U. S. 388; *Webster* v. *Fall*, 266 U. S. 507; *Neher* v. *Harwood*, 128 F. 2d 846 (C. C. A. 9), certiorari denied, 317 U. S. 659; *Janes* v. *Lake Wales Citrus Growers Ass'n.*, 110 F. 2d 653 (C. C. A. 5); *National Conference on Legalizing Lotteries, Inc.* v. *Goldman*, 85 F. 2d 66 (C. C. A. 2).

The only specific complaint petitioner made as to the Texas respondents was that they, as a means of compelling petitioner's compliance with the National Board's order, had refused to consider or grant petitioner's pending Form 10 applications (R. 30–39). But prior to the issuance of the injunction herein the Regional Board, at the direc-

tion of the National Board, had proceeded to consider and dispose of those applications, without reference to petitioner's noncompliance with the National Board's order (R. 124–125, 145–147, 246). As stated by the court below (R. 383), "there was no likelihood of a recurrence" of their refusal to process the applications, "and any doubt on the subject should have been resolved in favor of the regularity of official conduct." *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15; cf. *Waite* v. *Macy,* 246 U. S. 606. In these circumstances no useful purpose would be served by ordering the processing of the Form 10 applications. *United States* v. *Alaska S. S. Co.,* 253 U. S. 113; *Boggus Motor Co.* v. *Onderdonk,* 9 F. Supp. 950 (S. D. Tex.); *Securities and Exchange* v. *Torr,* 87 F. 2d 446 (C. C. A. 2); *Nelson* v. *Simon Hardware Company,* 145 F. 2d 386 (App. D. C.); cf. *Yarnell* v. *Hillsborough Packing Co.,* 70 F. 2d 435 (C. C. A. 5). The court below correctly held, therefore, that petitioner "had no real controversy with the Texas [respondents] at the time the injunction was issued" (R. 383).

3. In any event, Congress has not provided for judicial enforcement or review of orders of the National War Labor Board. It is now settled that such orders in themselves neither alter the legal rights of the parties nor impose legal sanctions of any kind, and are not reviewable in the federal courts. *Employers Group, etc.* v. *National War Labor Board, supra; National War Labor Board*

v. *Montgomery Ward & Co., supra; National War Labor Board* v. *United States Gypsum Co., supra.*

The petitioner seeks relief in this proceeding only against the Board's order, which "does not of itself adversely affect complainant" (cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130) and contains none of the incidents requisite for judicial review in the federal courts. *Employers Group, etc.* v. *National War Labor Board,* 143 F. 2d 145 (App. D. C.); *Baltimore Transit Co.* v. *Flynn,* 50 F. Supp. 382 (D. Md.); cf. *Pennsylvania R. R. Company* v. *Labor Board,* 261 U. S. 72; *Pennsylvania Federation* v. *Pennsylvania R. R. Company,* 267 U. S. 203; *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297; *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299. Cf. *Watson* v. *Buck,* 313 U. S. 387, 399–400; *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 237–238; *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1945.

APPENDIX

1. The War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. (Supp. III) 1501) provides, in part, as follows:

> SEC. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", and by any other statute, shall have the following powers and duties:
>
> (1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

* * * * *

2. Executive Order No. 9370 (August 16, 1943; 8 F. R. 11463) reads, in part, as follows:

AUTHORIZING THE ECONOMIC STABILIZATION DIRECTOR TO TAKE CERTAIN ACTION IN CONNECTION WITH THE ENFORCEMENT OF DIRECTIVES OF THE NATIONAL WAR LABOR BOARD

By virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

In order to effectuate compliance with directive orders of the National War Labor Board in cases in which the Board reports to the Director of Economic Stabilization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective

prosecution of the war, to issue such directives as he may deem necessary:

(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a non-complying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated;

* * * * *

(c) To the War Manpower Commission, in the case of non-complying individuals, directing the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both.

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